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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 20

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC., Employer, and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS, LOCAL 627, Union.	No. 37-CA-008316 **STATEMENT OF POSITION OF THE CHARGING PARTY ON REMAND**

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I. INTRODUCTION

The D.C. Circuit made fundamental errors with respect to the application of Section 8(f), 29 U.S.C. §158(f). One judge stated in oral argument that she had never had an 8(f) case and none of the other judges expressed any familiarity with the concept. Their opinion reflects this lack of knowledge.

The evidence before the Board demonstrates that the decision to terminate (and not layoff) the Boilermakers members had no legitimate purpose. The real purpose of the decision to terminate them was to allow Hawaiian Dredging Constriction Company ("HDCC") to sign an agreement with another union which would and did require HDCC to hire its members in preference to the terminated Boilermakers. The decision to terminate its employees had nothing do with a claim the employer only operates under the provisions of a collective bargaining agreement. Rather, the purpose was to terminate them so that it could sign with another union which insisted that its members be preferred over the rehiring of the terminated employees.

II. STATEMENT OF THE FACTS

Hawaiian Dredging Construction Company was a long time Union contractor in Hawaii. Indeed, it is the largest union contractor in Hawaii. It has had a long history of collective bargaining relationships with various unions, including the Boilermakers Union.

Things went wrong in negotiations.

The relevant agreement between the Association of Boilermakers Employers of Hawaii (the Association) and Boilermakers Local 627 ("Boilermakers") expired on September 30, 2010, approximately five months before the events that led to this case. Because the other employer which was a member of the Association is not involved in this case, we will refer to the employer as HDCC.

The parties had been negotiating prior to the date of the termination, but nonetheless the agreement expired and was not extended.

On October 1, the Boilermakers notified the employer's representative, Tom Valentine, that it was available to negotiate, but specifically advised the employer that because the

agreement had expired, the Union was freed of its no strike obligation and reserved the right to strike without notice. That was, of course, the Union's right.

Indeed, on that date, a crew of Boilermaker represented employees informed HDCC that they would not perform work and followed through on their threat. They engaged in a work stoppage. The employer continued to operate.

A week later, on October 8, the Association and the Union extended the terms of the agreement for twenty-one days to facilitate further bargaining. There was thus more than a "gap" here, there was direct job action to bring pressure on HDCC.

No agreement was reached and the October 29 deadline passed. Between October 29 and November 12, there were further exchanges, and still no agreement was reached. The parties disputed the inclusion of certain benefits. But nonetheless, on November 12, the employer asserted (and as it turned out erroneously) that an agreement had been reached and sent to the Union its proposed agreement. This was, at that time, just a bargaining tactic.

Five days later, the Union made it clear that the proposal was not the agreement and that there were disputed benefit issues. Thus, even five days later, after the employer claimed it had reached an agreement, the Union made it clear that there was no agreement.

On December 6, Tom Valentine informed the Union that HDCC would not accept the additional terms, clarifying that therefore there was no agreement. Nonetheless, on that same day, for tactical reasons, the Association on behalf of HDCC filed a charge with the Board alleging that the Union had not negotiated in good faith because it had rejected the terms of an agreed upon collective bargaining agreement.

During this period between October 29 and November 12, the parties operated without the terms of an agreement. There was no extension agreement. HDCC did not in halt or delay any work, even though there was no agreement.

On December 6, the Union engaged in a strike by failing to dispatch workers to an important HDCC project. The Union made it clear to the Company that the purpose of that job action was to get management's attention. HDCC went so far as to notify its major customer,

Hawaiian Electric Company, of its dispatch problems with the Union arising out the collective bargaining negotiations.

On that same date, December 6, Tom Valentine stated that the Union's letter of November 12 did not correctly reflect the agreement between the parties. The labor dispute described above continued on December 7, and HDCC was required to transfer welders from other ongoing projects to the disputed project, forcing the other projects to shut down. According to a Company exhibit, Union members failed to show up for approximately twenty-four twelve-hour shifts as of December 16 (Resp. Ex. 16). Hawaiian Electric, HDCC's largest customer, openly retaliated by removing some work from HDCC because of HDCC's problems with the Union with respect to staffing.

On December 18, Hawaiian Electric directed HDCC to terminate four welders. The Union did not grieve it and could not since there was no contract in effect.

During this period, the NLRB was processing the employer's charge against the Union that the Union had reneged on the asserted collective bargaining agreement.

Before we proceed to what happened on February 17, 2011, we should summarize the events.

The contract expired on September 30. The parties worked without a contract for a week, even though the Union had threatened a job action. There was a one day job action during this period. On October 8, the parties entered into an extension of the contract through October 29 to facilitate negotiations.

On October 29, the extension agreement expired, and HDCC continued to work without interruption. During that period again, HDCC was advised that the Union had the right to strike. The parties exchanged proposals, and, on November 12, HDCC sent a proposed agreement to the Union believing that that reflected the parties' agreement. Immediately, the Union advised HDCC that there was no such agreement and that the proposed agreement failed to contain terms that were important to the Union concerning benefits.

In December 2010, for about a week, some of the members refused to work, and the Union failed to dispatch employees to one important job site for its major client, Hawaiian

Electric. Nonetheless, HDCC continued to work boilermakers during this period, despite the work stoppages.

On February 17, 2011, HDCC and the Association received notice from the NLRB, by way of a letter that was dated February 14, that its charge against the Union had been rejected. Keep in mind that the charge filed by the employer was that the Union had failed to execute an agreed upon collective bargaining agreement. On that same date, February 17, the employer terminated all the Boilermakers members, stating to the Union that it would no longer use Boilermaker Union members for future work.

On that same day, every member of the Union was terminated and discharged. All were fired. None was told that they would ever be rehired. None was laid off on a temporary basis. There was work available yet they all were terminated.

On February 17, when Tom Valentine announced that the Association, and thus HDCC, would not employ any more Boilermakers, the Boilermakers working for HDCC were terminated. The amended complaint at paragraph 7(a) alleges that on or about February 17, "Respondent discharged, laid off, and/or terminated the following employees …." (G.C. Ex. 1(f).) HDCC, in its answer to the amended complaint, admitted that allegation. (*See* HDCC Answer to Amended Complaint at ¶ 1, G.C. Ex. 1(j).)

It is undisputed that, on that same day, the employees were told that they were being terminated. None was told that the termination was temporary or that they would be called back at some later time.

HDCC stipulated that the termination of the employees was not due to lack of work. (Tr. 9-10 and 62.) The only reason claimed by HDCC to terminate its long term employees was because there was no collective bargaining agreement in effect at that time. The Boilermakers were working at five separate sites where there was ongoing work. (Tr. 57-59.) Four locations were ongoing work for HDCC's major customer, Hawaiian Electric. (Tr. 59.)

On February 23, six days later, a collective bargaining Agreement was entered into with the United Association, another union in Hawaii. Even though that agreement was dated

February 23, it is apparent from the record that discussions regarding that agreement had begun prior to February 17. There were at least two prior meetings and Reginald Castanares, the principal officer of the United Association Local Union, explained that there had been one prior meeting and a separate walk-through of the training center prior to the February 23 date when the agreement was executed. Mr. Castanares testified that meetings began in mid-February of 2011. First, they toured the training center. (Tr. 128.) Following that, there was a meeting regarding signing a Collective Bargaining Agreement. (Tr. 128). It was only at a third meeting on February 23 that the parties signed a Collective Bargaining Agreement.[1]

What is important, however, for the purposes of this remand, is to keep in mind that Mr. Castanares said from the beginning of these meetings that the Boilermakers could not be allowed to work unless they were members of the United Association. Mr. Castanares specifically rejected the suggestion that the Union would accept them and dispatch them back to Hawaiian Dredging. (Tr. 129-130.) Mr. Castanares again made it clear that if they wanted to get dispatched, a condition of even being able to apply for dispatching would be their membership in the Union. (*See* Tr. 136 *et seq*.; *see* portions of his affidavit submitted in support of the motion for summary judgment quoted below.)

HDCC temporarily halted the welding work done by Boilermaker Union members between February 23 and March 1, a very short period of time. On March 1, members of the United Association began to do welding work previously done by members of the Boilermakers Union. The first member of the Boilermakers Union to begin work waited three weeks to be dispatched by the United Association and did not begin work until March 21. Thereafter, more of them began work, but some never returned to work at HDCC. They lost the seniority they had accrued.

In summary, we recognize that when HDCC terminated its collective bargaining

[1] Valentine thinks the meeting was the next day after the February 17 letter at least: "The next day, on February 18, 2011, I, along with others from HDCC met with representatives of the Plumbers & Pipefitters Union, Local 675 (the 'Pipefitters Union'), to discuss and possibly negotiate a collective bargaining agreement." It is likely then that efforts were made at the latest on the last day Boilermakers worked, which was February 17, to contact the Pipefitters.

relationship with the Boilermakers Union, it had the right to do so. We also recognize that it had the right during that same time to begin talking with the Pipefitters about signing an agreement and to reach an agreement on February 23.

What is at issue, however, is whether HDCC had the right to terminate (discharge) the Boilermaker Union members rather than to continue to work them or to tell them they were temporarily laid of that that they would be re-employed when work resumed. What is at issue is whether HDCC could legitimately claim it terminated them because of an asserted practice of not working employees unless subject to a collective bargaining agreement. We submit HDCC terminated them in order to sign the agreement with the Pipefitters which insisted that it would only refer out members of its Union. This insistence by the Pipefitters violates the National Labor Relations Act, including Section 8(f). Alternatively, assuming that HDCC wasn't clear on whether the Pipefitters would allow non-members to be referred back to HDCC on February 17, it knew within two days that the Pipefitters would not allow the former Boilermakers members to work unless the Pipefitter members were first referred, and the former Boilermaker employees would have to become members of the Pipefitters without any eight-day grace period.[2] HDCC had a legal obligation at that point to rehire them knowing that it had created a situation where they would be discriminated against unlawfully in the hiring process and the resumption of the welding work.

III. THE D.C. CIRCUIT ERRONEOUSLY CONCLUDED THAT THE TWO GAP PERIODS REFLECTED AN INTERIM AGREEMENT BETWEEN THE PARTIES

The D.C. Circuit's remand is, in large part, based upon a substantial misunderstanding of the National Labor Relations Act. This is particularly troublesome for a Circuit that has had repeated cases that have understood that once a Collective Bargaining Agreement has expired,

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[2] *See NLRB v. Iron Workers Local 118*, 720 F.2d 1031 (9th Cir.1983) (per curiam); *Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 433*, 266 N.L.R.B. 154 (1983), *enforced*, 730 F.2d 768 (9th Cir.1984) (workers must be dispatched and provided eight-day grace period when being dispatched to employer where employee did not incur dues obligation, which would apply to HDCC).

there is no agreement between the parties.

The Circuit Court stated:

> The Board does not appear to have rejected the ALJ's view that the construction industry presents unique circumstances for purposes of determining Section 8(a)(3) and (1) violations. Yet the Board never confronted the evidence relied on by the ALJ as to nexus and animus, namely that the company's Section 8(f) agreements contemplated implied agreements during gap periods and overwhelmingly showed that the company's conduct was inconsistent with discouraging union membership, much less Boilermakers membership. Given the evidence on the nature of the company's twenty-year practice under its business model, as found by the ALJ and discussed by the dissenting member, and the evidence credited by the ALJ relevant to the company's motive, the Board failed adequately to explain its conclusion that the gap periods defeated the company's defense and the company would not discharge craft employees where no current Section 8(f) agreement existed and the company had no expectation of a new agreement with the Boilermakers.
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> The Board did not ignore entirely the company's arguments or the dissenting member's views. *See, e.g.*, Dec. 4, 6. But it never confronted the critical point that, in view of the evidence regarding the company's twenty-year practice, and the company's credited evidence, the Board was giving inappropriate emphasis to the gap periods. For instance, Member Miscimarra, echoing the company's arguments, concluded as to animus and nexus that the Board had "fail[ed] to appreciate the nature of the [company's] collective-bargaining relationships, which historically had been 'very cooperative,'" and the fact that "[t]he evidence shows that in practice, the [company] and the unions with which it partners have treated hiatus periods between 8(f) contracts as contract extensions." Dis. Op. 14. He explained,
>
> > even assuming there was a brief gap of less than a week in [the company's] *decades-long* practice of performing all craft work under collective bargaining agreements ... this cannot reasonably be regarded as defeating [the company's] *Wright Line* defense. Under the majority's view, the only way the [company] could establish a valid *Wright Line* defense would have been to immediately cease all welding work the very moment the 2005-2010 [Section 8(f) collective bargaining agreement] expired, but this would have been contrary to [the company's] long history of bridging such hiatus periods cooperatively.
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> *Id.* at 15 n.33. The Board has no response to this contradiction in its analysis. Its response was limited to the gap periods. Dec. 3-4.

Hawaiian Dredging Constr. Co. v. NLRB, 857 F.3d 877, 884-85 (2017).

The Court was wrong. The law is clear that when a collective bargaining agreement expires there is no agreement between the parties. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991). The D.C. Circuit has famously held that even when a Collective Bargaining Agreement expires, the employer may assert a past practice in order to make unilateral changes, recognizing that there is no agreement in place. *See Heartland Plymouth Court MI, LLC v. NLRB*, 650 Fed.App'x 11 (D.C. Cir. 2016), and *E.I. Du Pont de Nemours*, 364 N.L.R.B. No. 113 (Aug. 26, 2016). The fact is that there was no agreement, not even an implied agreement, at any time after September 30, except for the period of October 8 through October 29, when the parties explicitly agree upon an extension agreement.

This principle is even more powerful when considered in the context of the Section 8(f) agreement. Once the 8(f) agreement expires, an employer such as HDCC was, as illustrated in this case, free to make complete changes in wages, hours and working conditions. Indeed, it could repudiate the collective bargaining agreement and become non-union or lawfully sign with another Union. Thus, in the regime of Section 8(f), there is no implied agreement. In fact, the reverse is true.

The Court found this implied agreement in language in the dissent of then member Miscimarra. There is no citation for the legal authority for this proposition because there is no legal authority. There is also nothing in the record that would illustrate that the parties thought that they had any implied agreement during any period of time.

As we discuss below, the record is actually to the contrary. The Boilermakers Union made it clear in early October that there was no agreement, and the Union maintained the right to strike. Immediately HDCC was put on notice of the Union's position by a letter from counsel to the union.

Approximately a week later, the parties did enter into a written extension agreement, recognizing that only a written extension agreement would act as a binding agreement, eliminating any suggestion that the parties had any implied agreement before that period.

On October 30, after the extension agreement expired, the parties again recognized that

there was no agreement and the Union made it clear to HDCC that its position was that there was no agreement.

On November 12, when HDCC thought it reached an agreement, it sent that proposed agreement to the Union. The Union responded by saying that that agreement wasn't an accurate agreement of the parties, thus again reaffirming that there was no express or even an implied agreement between the parties.

Now-Chairman Miscimarra simply made up the idea of an implied agreement.[3] It is a bizarre proposition that there is an implied agreement during the period when the parties are in negotiations, particularly where the Union (or the employer) makes it repeatedly clear that there is no agreement, simply because parties may reach an agreement at some point in the future and may make that agreement retroactive. This is a radical shift in labor law. There is no support for such an idea. If there was an "implied agreement," then the Union would not be free to strike, and the employer would not be free lock out. The employer would have to arbitrate all disputes under this "implied contract" concept. Indeed, contradicting now-Chairman Miscimarra's position, this would have meant that during the period in question, HDCC was not free even to repudiate the Section 8(f) agreement. An "implied agreement" is simply a bizarre theory without legal support and contrary to fundamental principles of labor law.

The Circuit Court, in ordering remand, never had this type of issue before it because it was never argued by any party including HDCC or and as a result it made a fundamental mistake in its remand.

The Court's remand, however, requires the Board to consider whether, because there were two gaps, as found by the Board, this is sufficient to undermine the employer's position that it always operates under the terms of a written collective bargaining agreement. The Court did not limit the Board's consideration to those two gaps. In its decision, the Board had not addressed the period on and after November 12 until February 17. It may do so now. Nor has

[3] Come December, he will not be on the Board to explain this bizarre theory of "implied agreement."

HDCC explained why it did not operate from February 17 until about March 1 even though it had signed an agreement with the Pipefitters.

First, the employer's assertion that for the last twenty years it has operated under the terms of a collective bargaining agreement is meaningless. The reason it lacks probative value is because the employer did not offer any examples where there were gaps or hiatuses between agreements, or where there were groups of workers who worked without the terms of an agreement to test this theory. Indeed, it appears as though for that twenty-year period, there were agreements in place at all times, either extension agreements or newly negotiated agreements. There was relative labor peace and thus, the fact that there was an agreement in place to allow HDCC to operate is a meaningless piece of evidence. There was simply no test of the meaning of that evidence. It is a best a theoretical statement.

Here, the Board is presented with the only circumstance where a union with a collective bargaining relationship with HDCC continued to bargain even though there was no collective bargaining agreement in place. Thus, this is the only circumstance that can be used to judge whether the employer's asserted defense overcomes its claimed right to terminate employees because of their Union activity.

The D.C. Circuit was obviously looking for more explanation. It is clear in the record.

The Court criticized the Board's analysis as follows:

> Under *Wright Line*, evidence of a good faith belief suffices to establish a defense, even if the belief is erroneous. *See, e.g.*, *Sutter East Bay Hosps. v. NLRB*, 687 F.3d 424, 435-36, 402 U.S. App. D.C. 91 (D.C. Cir. 2012). The Board's current analysis under *Wright Line* offers no adequate reason to conclude that even if company officials were mistaken factually about their history, their belief was insufficient to rebut the inference of discriminatory motive. *See id*. The ALJ credited the company's testimony that they had — or at least they believed that they had — performed all craft work in the last twenty years under Section 8(f) agreements. The ALJ concluded therefore that the company had presented in rebuttal legitimate and substantial business justifications for its action, distinguishing Board precedent on which the General Counsel and the Boilermakers relied. *See* ALJ Dec. 24-25. The Board, of course, was not required to reach the same conclusion as the ALJ, but so far it has not adequately engaged the record evidence, and by not doing so it had failed to "exercise[] its

> judgment in a reasoned way." *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 652 (D.C. Cir. 2016).

Hawaiian Dredging Constr. Co. v. NLRB, 857 F.3d at 885.

The Board in its Decision summarized this:

> We do not doubt that the Respondent's practice is to rely on hiring halls for labor pursuant to prehire collective-bargaining agreements. Upon examination of the full record, however, we are not persuaded that the Respondent so strictly adheres to that practice that it would have discharged the discriminatees on that basis alone. In fact, the evidence reveals the contrary. As the General Counsel observes, the Boilermakers-represented employees performed craft work in the months leading up to the February 17, 2011 discharges. Even setting aside the period from November 12 until February 17-- when the Respondent believed the parties had an enforceable agreement--there were two periods during which the Respondent knowingly operated without an agreement in place. The first period occurred from October 1 through 7. Although its agreement with the Boilermakers had expired on September 30, it was not until October 8 that the parties agreed to extend the terms of that agreement through October 29. Yet the Respondent continued to perform craft work during that week-long period. The dissent overlooks the probative value of this evidence, contending that the hiatus periods between contracts were treated as contract extensions by the parties pursuant to "tacit agreement." It relies on the testimony of Valentine and the Respondent's President William Wilson that, when the Boilermakers' membership rejected the Respondent's latest offer on September 30, they believed that the expired agreement would continue to be enforced. Although that may have initially been the case, the Union promptly and affirmatively dispelled this belief. On September 30, Union Business Manager Meyers called Valentine to inform him that because the contract was expiring and the membership had rejected the Respondent's most recent proposal, they should resume negotiations that day. Valentine countered that immediate negotiations were unnecessary because the parties could continue working under the terms of the expired agreement. According to Valentine's own testimony, Meyers expressly disagreed. (Tr. 195-196).
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> The Boilermakers' subsequent actions confirm that it viewed the expired contract as inoperative. On October 1, the Boilermakers sent Valentine an email stating, "As you know Allen [Meyers] was available to continue negotiations last night and will be available all day. Attached is a letter for your information." The attached letter, from the Boilermakers' attorney, advised the Boilermakers that because its agreement with the Respondent had expired, its members were free to cease working at any time. Valentine admitted that he perceived this as a threat that the Boilermakers would engage in a work stoppage, notwithstanding the no-strike clause contained in the parties' expired agreement. And, in fact, Valentine's concerns were substantiated later that day when the

> Boilermakers members announced a work stoppage. These actions hardly reflect a "tacit agreement" to extend the terms of the expired contract.
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> The second period occurred from October 30 through November 12. The parties failed to reach a new agreement by the new October 29 expiration date and the Respondent again continued to perform welding work using Boilermakers members. Once again our dissenting colleague attempts to diminish the significance of this period by asserting that Valentine believed that a new agreement had been reached before November 1. As evidence, he points to an exchange of emails between the Boilermakers and Valentine on November 1, in which the Boilermakers sent Valentine a document outlining the "new Hawaii Wage/Benefits Rates" and Valentine responded that certain benefits included in the document had not been discussed or agreed to. From these limited communications, the dissent infers an acknowledgment between the parties that they had reached a complete agreement. We are not prepared to make that leap. He also relies on Valentine's uncorroborated testimony that he was informed that the agreement had been ratified by the Boilermakers' membership sometime prior to the November 1 exchange. In addition to the lack of any evidence that ratification occurred, the dissent's position is directly contradicted by the judge, who found that "[c]ontract negotiations continued into November [.]" As noted by the judge, the earliest indication of Valentine's belief that the parties had reached a successor agreement is contained in a November 12 letter.
>
> In short, from October 1 through 7, and then again from October 30 until November 12, the Respondent continued its operations using Boilermakers-represented employees, despite not having a collective-bargaining agreement in place.

Hawaiian Dredging Constr. Co., 362 N.L.R.B. No. 10, slip op. at 3-4 (Feb. 9, 2015).

There is, however, much more in the record for the Board to rely on to address any question that the Court may have if this case comes back before it. Indeed, that additional evidence not specifically relied upon by the Board in its original decision proves the point that HDCC fabricated the claim that it always operates under the terms of an agreement.[4]

As noted, the Union made it clear in early October that there was no agreement and the Union had the right to strike. There was a work stoppage. HDCC complained about this work stoppage in an internal email. (*See* Resp. Ex. 4.) "Our boilermaker crew showed up to work this morning and notified Manny that they were not going to work because their contract had

[4] The February 17 letter to the Union did not assert this reason for terminating its employees.

expired." This is more than a mere "gap."[5]

The parties entered into an extension agreement indicating that the parties' understanding and practice was that there is no agreement unless there is a written extension agreement. Thus, the periods are more than mere "gaps." Between October 30 and November 12, the Union again took the position that there was no agreement and it had the right to strike. This is more than a "mere gap."

While the Board did not address the period between November 12 and February 17, it did not reject use of that period to determine whether HDCC's business justification was valid. The Board should address that time period now.

After HDCC asserted that an agreement had been reached on November 12, the Union made clear that there was no such agreement. (Resp. Ex. 8.) HDCC knew there was a dispute whether an agreement had been reached. (Resp. Ex. 7.) This fundamentally undermines HDCC's position because HDCC continued to operate notwithstanding both the alleged unfair labor practice of the Union in insisting that there was no agreement, and the employer's unfair labor practice, in claiming there was an agreement. Moreover, during that period, there were work stoppages by the Union in support of its bargaining position, or at least work stoppages by some of its members, at one of HDCC's important projects for its biggest customer, Hawaiian Electric. (*See* Resp. Ex. 9, 10, 11, 13, 14 and 15.) These work stoppages were sanctioned by the Union because the Union failed to dispatch employees, thus forcing Hawaiian Electric to find another way to do the work and take the work away from HDCC. If HDCC thought there was an agreement, it could have enforced the agreement by terminating those involved for violating the no-strike clause. It did not do so. There is more than a mere "gap" between November 12 and February 17. HDCC was so frustrated that Mr. Valentine stated internally: "With the current situation and the ongoing contract problems with the boilermakers I believe it's time for HDCC to seriously evaluate if our relationship with the boilermakers is the best option moving

[5] HDCC could have asked for an extension or bridge agreement during these gaps. Its failure to do so undermines its claims.

forward." (Resp. Ex. 15.)

This repudiates HDCC's defense, since it was already contemplating withdrawing from the "boilermakers," and nothing is said about having to have an agreement in place at all times, HDCC knew there was no agreement for a long period of time from September 30, 2010 to February 17, 2011, excluding one short period of an extension agreement. There is no evidence in any of the internal emails that HDCC thought it could not operate without an agreement. To the contrary it continued to operate in the face of repeated assertions by the Boilermakers that there was no agreement and several work stoppages.

In summary, then, there is far more in the record to support the Board's conclusion that HDCC's business justification (that it only operates when it has the terms of a collective bargaining agreement in place) is undermined by the very events that occurred in this case. It is more than what the Board referred to in its earlier decision, and the Board should support the same decision with this additional evidence, which is in the record.

This additional evidence, which is contrary to the reasons for the remand by the Circuit Court, makes it clear that HDCC's asserted business justification is contradicted by the very circumstances that led up to the February 17 decision to terminate all the members of the Boilermakers Union.

IV. HDCC'S MOTIVATION TO TERMINATE THE BOILERMAKER UNION MEMBERS WAS THE THEIR UNION MEMBERSHIP AND THE POSITION OF THE PIPEFITTERS THAT ITS MEMBERS HAD TO BE HIRED IN PLACE OF THE BOILERMAKERS

The Circuit Court chided the Board for not fully explaining these events within the context of the Section 8(f) agreement. Section 8(a)(1) and 8(a)(3) apply to the same force and effect, whether or not it is a Section 8(f) agreement, a Section 9(a) agreement, or no agreement at all. The differences relate to the enforcement of the collective bargaining agreement not the protections afforded to employees. *See John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced, Int'l Ass'n of Bridge, Structural & Ornamental Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

Here, however, there was a union membership related motivation on the part of HDCC.

HDCC was tired of dealing with the Boilermakers Union by Februar17.. On February 17, 2011, when it terminated that relationship, it made that clear and asserted that reason for terminating its Boilermaker employees. It went a different direction and sought out another union. Although lawfully permitted to terminate the relationship and lawfully permitted to seek a relationship with another Union, what HDCC could not lawfully do was terminate its long term employees in order to seek a relationship with another Union which would insist that its members be employed first and also insist that it would not consider the employees for membership if they remained members of the Boilermakers Union.

The facts demonstrate that HDCC's business justification in terminating its Boilermaker employees was based solely upon a question of Union affiliation.

First, when the Union was advised of the reason for the termination of the bargaining relationship, HDCC made it clear that it would not hire members of the Boilermakers Union on future projects. Although the Court and the dissent attempted to ignore that statement in the letter that was sent to the Union on February 17, it is there bold and clear: "Since our prior agreement with the Union terminated on September 30, 2010, you are hereby advised that Association does not intend to use utilize members of the Boilermaker's Union for future work." (*See* G.C. Ex. 4.)

Two things are remarkable. First, HDCC relied on the fact that there had not been an agreement September 30, 2010, undermining the "implied agreement" argument. This letter made it clear that "the Association does not intend to utilize members of the Boilermakers Union for future work." This is plainly a decision based on Union membership.

The facts support this analysis. The Board is well aware that Section 8(f) allows unions in the building trades to condition use of the hiring halls upon lawful union security arrangements.[6]

HDCC, as a Union employer, was well aware that if it signed an agreement with another Union, its purported plan in February, that new union would condition referrals on membership in that Union. Moreover it knew that any new union would condition such an agreement on

[6] *See* fn 2, *supra*.

hiring all employees from its hiring hall and not allowing HDCC to hire off the street or rehire any former employees. Indeed, this is why it is important for the Board to closely review the record and, in particular, the testimony of Mr. Castanares that there was first a tour of the facility, and then a preliminary meeting before the February 23 meeting where the Collective Bargaining Agreement was finalized. Thus, the inference is clear on the record that HDCC was talking with the Pipefitters before February 17.

In any case, it is also clear that at the first meeting, the Pipefitters made it very clear that the Boilermaker Union members who had been discharged would not be referred and could not be hired back by HDCC unless they became members of the Pipefitters Union. Mr. Castanares made this clear three times in a declaration he provided in support of the Motion for Summary Judgment (Declaration of Reginald Castanares, attached to HDCC's Motion for Summary Judgment, G.C. Ex. 1(k)) and in testimony he gave at the hearing. (*See* Tr. 129-130, 136, 145, 146 and 152.) Moreover it was clear that HDCC would have to hire from the referral system. And the hiring of Pipefitters from March 1 until the end of March when the first former HDCC employee was hired proves this.

The Pipefitters made it plain repeatedly that in order to be referred by the Pipefitters' hall or to go to work for HDCC under the new Pipefitters agreement, the Boilermaker employees had to become full members of the Pipefitters Union. That is, they had to complete an application to be processed in order to be eligible for referral. Reginald Castanares, who is the Business Manager of the Pipefitters, repeatedly testified that application for membership was a condition of referral. (*See* Tr. 129-130, 136, 145, 146 and 152.) A permit fee was required. (Tr. 146.)

> Q. When you say "application," what is it that you mean by application as part of the process?
>
> A. Well, when someone comes to our office wanting to apply to our Union in whatever specific trade, he has to fill out an application.
>
> Q. What is the application?
>
> A. It's where he gives his personal information and whatever qualifications he might have to show that he can validate his skill set, résumé, et cetera.

Q. Does the application include the membership process?

A. Yes.

(Tr. 152:4-14.)

Thus, the Pipefitters made it plain that more than maintaining the financial obligation of the Union was a prerequisite to referral and dispatching by the Pipefitters Union. It included "the membership process." Moreover no 8 day grace period was provided as required by Section 8 (f).

This is confirmed by Mr. Gordon Caughman who is a General Foreman for HDCC. He had been previously a General Foreman of the Boilermakers and remained General Foreman of the Pipefitters. Mr. Caughman, who had previous experience working under Pipefitters, testified in response to question from counsel for HDCC:

> Q. Did you do anything else before you were dispatched?
>
> A. Yes. Previously, back in the '90s, to get on the out of-work list you would give them $50 and sign a piece or two of papers and then they would dispatch you. This time things were different. One of the forms you sign, at the bottom of the form it asks you if you're a member of another Union, and then it said words to the effect that you had to get a withdrawal from the other Union.
>
> Now, back in the '90s none of that was enforced. I was surprised to find out that now it is enforced. So I had to go through several steps in order to -- my initial intention was not to join, it was to get a job as a permit hand, hoping things would work out with the Boilermakers Union. As it turns out, I had to join the Pipefitters Union, but they had large projects that they were working on and coming up and had a lot of work.
>
> So I -- what I did was I had an interview with the hall, I contacted the Boilermakers Union and got a withdrawal slip. I presented a résumé, and I took a welding test.

(Tr. 175:2-22.)

Mr. Caughman thus confirmed that, in order to be referred, he had to both give up his membership in the Boilermakers Union and obtain full membership in the Pipefitters Union.

Tom Valentine testified that he knew that membership, including application to join the Pipefitters, was a condition of referral:

> Q. Was there any discussion about the employees who had been laid off, the former Boilermaker employees?
>
> A. Yes, there were.
>
> Q. Could you tell us about that discussion.
>
> A. In the course of that meeting with the Pipefitters, I specifically addressed to the head of the Pipefitter our desire to have employees, former employees of Hawaiian Dredging who -- to be potentially our workers in the future and asked them the process for those people to become members of the Pipefitters Union in that process.
>
> I had indicated to him that I felt that the workers that we'd had doing the work were fully qualified to do our work, they've been our employees historically, and until very recently, and felt that it would be appropriate for them to be our employees again under the agreement.
>
> He made clear to me that they have three requirements for people choosing to be a pipefitter. One is that they needed to make an application; two, they needed to have an interview; and three, they needed to pass a welding test. He indicated due to the number of other signatory contractors and their commitments to them and their Union, that they needed to follow their standard practices for people choosing to become Pipefitters.
>
> In evaluating those criteria, it was my opinion that our former employees, our former Boilermaker members who would choose to become Pipefitters would qualify under those requirements and could become employees of Hawaiian Dredging.

(Tr. 108:4-109:6)

Mr. Valentine was thus aware that union membership, and that is full membership including completing an application for membership, was a condition of referral. The Pipefitters were unlawfully preventing the rehiring any of the Boilermaker employees.

Although Mr. Valentine professes that he doesn't care what union his employees are members of (Tr. 109-121, 125), he was well aware that the union he was signing an agreement with would not refer the Boilermakers members because of their lack of full membership in the Pipefitters. He also knew they could not accept membership from the former HDCC employees as long as they maintained their membership in the Boilermakers Union. He also knew the terms of the Referral Procedure attached to the contract and that those procedures directly excluded the Boilermakers from any priority referral. Mr. Valentine confirmed this understanding in an

affidavit provided in support of the Employer's motion for summary judgment:

> During this February time period, HDCC asked the Pipefitters Union to accept the welders formerly employed by HDCC and refer them to HDCC. The Pipefitters Union denied HDCC's request and stated that it would refer a welder to HDCC if the employee completes the Pipefitters process. I understand that this process required an application, welding test, and an interview.

(*See* Declaration of Tom Valentine at ¶ 16, attached to HDCC's Motion for Summary Judgment, G.C. Ex. 1(k).) Mr. Valentine confirmed this testimony at the hearing. At the first meeting, Mr. Valentine was expressly told that the Pipefitters could not take the Boilermakers and therefore that HDCC could not rehire them:

> Q. And who said it as best you can recall.
>
> A. Dan Guinaugh posed a question to Reggie about would they take our former Boilermaker employees as Pipefitters.
>
> Q. Is that what the Company wanted?
>
> A. Yes.
>
> Q. And what did Reggie say?
>
> A. Well, Reggie said that they could not take them unconditionally. They had a process that they had to follow, and, you know -- and also they had the most favored nation clause in their contract where if they did something outside of what their procedures were, they had to offer it to their other signatory contractors as well, and that would be -- he did not believe that would be prudent in this situation and refused to do that.
>
> Q. Okay. Did Dan offer -- well, what else was said at that meeting about the former employees?
>
> A. Well, we appreciated his candor with it and understood and we, you know, we told -- or Dan, I believe, told Reggie that we would have to inform our former employees as to - you know -- you know, what this -- you know, what the process they were describing.

(Tr. 223:5-25.)

Mr. Valentine furthermore confirmed that the Pipefitters would not refer the Boilermakers if they remained members of the Boilermakers:

> Q. Do you recall if Dan made any offers to the Boilermakers about the former Boilermakers – I'm sorry, let me take that back.

Do you recall if Dan made any offers to the Pipefitters about the former Boilermakers?

A. Yes, he had offered that he could provide a listing of former members, or our former employees.

Q. And what did Reggie say?

A. He said they could not accept that.

Q. Did Reggie say anything else as to why he couldn't?

A. Well, he said that, you know, they would be willing to take them, but they did not want to be in the position or could not be in the position of openly soliciting them to become members of the Union if they were members of another Union.

(Tr. 224:11-25.)

Mr. Valentine further confirmed that HDCC had specifically requested that the Boilermaker employees be moved so that they could continue to work for the company but under a different collective bargaining agreement:

Q. That Dan had asked the question of the Pipefitters about the movement of the employees who had been working under the Boilermaker contract, correct?

A. What do you mean by movement?

Q. Having them continue to work for the Company but under a different collective bargaining agreement.

A. Yes.

Q. And you were told by the Union that they couldn't just do that, correct?

A. Correct.

Q. All right. Were you ever told at any point after that that they could?

A. No.

Q. And the question was raised by Dan Guinaugh because you were interested in maintaining those employment relationships, correct?

A. Yes.

(Tr. 251:1-17.)

HDCC terminated the Boilermakers members on February 17. HDCC knew that it could not rehire any of the former Boilermakers members because the Pipefitters would not allow it to do so. First, it is plain that the Pipefitters imposed an unlawful condition that Boilermakers would have to drop their membership in the Boilermakers Union in order to become members of the Pipefitters. (Tr. 224.) Second, the Pipefitters also took the position that the Boilermakers would have to complete an application process, pass a welding test, and undergo an interview process. This is not limited to the financial requirement of paying the appropriate financial obligation.[7] Third, as discussed more fully below, the referral procedure contained in the Pipefitters' agreement would have prevented any of the Boilermaker employees from any immediate dispatch. Some of them would not have been qualified for dispatch even if they had joined the Pipefitters Union for a substantial period of time. In fact, none of the Boilermakers who completed the Pipefitters membership process went to work immediately for HDCC.

In summary, then, the facts demonstrate that the Boilermakers employees were summarily terminated on February 17, 2011. Their status was made clear to them; HDCC terminated them without suggesting they might ever be rehired. It appeared to be permanent. Even assuming that its business justification was that HDCC wanted a collective bargaining agreement covering its employees, it was plain immediately, when it met with the Pipefitters, that it could not rehire the Boilermakers members because the Pipefitters had placed unlawful restrictions on such rehiring. Thus, HDCC knew immediately that any effort to rehire the Boilermakers was thwarted by its negotiations with the Pipefitters, effectively turning the termination into a permanent termination on account of union membership (membership in the Boilermakers) and lack of union membership (in the Pipefitters).

It is plainly unlawful to condition referral on Union membership. HDCC became aware of this before it signed the agreement on February 23. It was aware of this at least at the preliminary meetings. It knew it was in a difficult situation because it had already terminated the Boilermaker Union members and now was faced with an adamant refusal by the Pipefitters to let

[7] It appears this is full dues, there is no evidence of a lesser hiring hall fee.

them be hired back.[8]

It is true that HDCC asked the Pipefitters to let them be hired back, but the Pipefitters adamantly refused. It is also undisputed that HDCC made an effort to contact its former employers and let them know that they could potentially seek work through the Pipefitters. None of this, however, repaired the damage incurred based on HDCC's termination of these employees because they were Boilermaker Union members and HDCC knew that it was going to be signing an agreement with another Union that would prefer its own members.

It is important to note that HDCC never asserted any of these long term employees were not competent or should not be hired. See Tr. 109 -109 (Testimony of Tom Valentine)

As described above, the Pipefitters conditioned referral on two unlawful conditions: (1) filling out an application and taking other actions inconsistent with simply a financial obligation to the Pipefitters; and (2) insisting that the Boilermakers give up their status as members of the Boilermakers. Analysis of the referral language will illustrate how it would be unlawfully applied.

The evidence in this record demonstrates that HDCC would have to comply with referral procedures of the Pipefitter Union in rehiring the former employees whom it had terminated on February 17. The Brief of Hawaiian Dredging in Support for its Motion for Summary Judgment lays out the precise problem here in complying with this request:

> Rather, less than a week after it terminated its relationship with the Boilermakers Union, it entered into an agreement with the Pipefitters Union and, in accordance with the Pipefitters CBA, began hiring workers from the Pipefitters Union, including many of the alleged discriminatees. HDCC had asked the Pipefitters Union to accept the welder formerly employed by HDCC and refer them to HDCC, but the Pipefitter s Union denied HDCC's request and stated that it would only refer a welder to HDCC if the welder completed the Pipefitters Union's process. It is undisputed that all of the Boilermakers welders who successfully completed the Pipefitters Union's process were dispatched to HDCC.

(Emp. Br. p. 10-11, G.C. Ex. 1(k).)

[8] At that point, to remedy the predicament created by the Pipefitters' unlawful claim that only its members could be referred, HDCC could have directly hired the Boilermakers back.

As the HDCC Brief concedes, the Pipefitters had expressly rejected the request of HDCC that the formerly employed workers could go directly to work. Rather, the Pipefitters Union denied that request and insisted that the referral procedure in the Pipefitter's agreement be complied with fully including a membership application. As noted, only a few of the discriminatees eventually satisfied the Pipefitter's restrictions, others did not.

The Declaration of Mr. Valentine in support of the motion for summary judgment expressly states the same thing:

> 14. The next day, on February 18, 2011, I, along with others from HDCC met with representatives of the Plumbers & Pipefitters
>
> Union, Local 675 (the "Pipefitters Union"), to discuss and possibly negotiate a collective bargaining agreement.
>
> ...
>
> 16. During this February time period, HDCC asked the Pipefitters Union to accept the welders formerly employed by HDCC and refer them to HDCC. The Pipefitters Union denied HDCC's request and stated that it would refer a welder to HDCC if the employee completes the Pipefitters process. I understand that this process required an application, a welding test, and an interview.
>
> 17. On March 1, 2011, we hired the first welders through the Pipefitters Union hiring hall.

(Valentine Decl. ¶¶ 14, 16, 17, G.C. Ex. 1(k).)

In this regard, Mr. Valentine understood that before an employee could be hired by HDCC, he had to complete the Pipefitters' process which "required an application, a welding test, and an interview." Thus, he was quite well aware that a discriminatee or anyone else could not be hired by HDCC until he completed a process that involved more than paying dues and fees to the Pipefitters Union after eight days of employment. In order to be referred, the employee had to complete the entire process which goes beyond the financial core obligation to pay dues and fees after eight days.

The fact that the HDCC employees could not be hired pursuant to the alleged unconditional offer was confirmed by the Business Manager-Financial Secretary of Local 675's Declaration. Mr. Castanares states:

> 5. When HDCC negotiated the CBA with the Pipefitters Union it inquired whether its former employees could be unilaterally dispatched to HDCC. The Pipefitters Union responded that it would refer all qualified individuals who completed the Local 675 membership application process, which included an interview and a welding skills level performance test.
>
> 6. The application process as described above is strictly enforced by the Pipefitters Union. These protocols allow the Union to monitor and maintain the necessary skills and quality of work of its members who are dispatched. The Pipefitters Union refers its members to more than 60 employers in Hawaii.
>
> 7. HDCC's request to be allowed to deviate from the Pipefitters Union hiring and referral procedures to allow them to hire former employees directly was denied. The Pipefitters Union CBA contains a "Uniform Conditions" provision (most favored nation clause) which would be violated if HDCC's request for a deviation of our hiring and referral procedures were permitted.
>
> 8. By February 25, 2011, six welders, not including Gordon Caughman, from HDCC signed in with the Pipefitters Union. These welders were Paul Aona, Kona Akuna, Joseph Galzote, Daniel Marzo, Henry Merrill and Joselito Peji.
>
> 9. By April 3, 2011, two more welders from HDCC signed in with the Pipefitters Union. These welders were Rolando Tirso and Ken Valdez.
>
> 10. The following individuals who were former HDCC employees have complied with the Pipefitters Union requirements of membership and have been dispatched: Gordon Caughman was dispatched on 3/21/11, Henry Merrill was dispatched on 3/22/11, Daniel Marzo was dispatched on 4/6/11, Joseph Galzote was dispatched on 4/7/11, Rolando Tirso and Ken Valdez were dispatched on 5/17/11.
>
> 11. To date former HDCC employees: Paul Aona, Kona Akuna and Joselito Peji have not completed the Pipefitters Union member application process.

(Castanares Decl. ¶¶ 5-11, G.C. Ex. 1(k).)

At paragraphs 5 through 7 and 10, he makes it explicit that the application process described in his declaration was "strictly enforced by the Pipefitters Union." he makes it clear that it included membership. As a result, the Union denied "HDCC's request to be allowed to deviate from the Pipefitters Union hiring and referral procedures to allow them to hire former employees directly …." He repeatedly makes it clear that membership obtained through an application process is a condition of dispatching. This is patently unlawful.

He also makes it clear the first former Boilermaker member was not dispatched until March 21 which was three weeks after HDCC resumed work with Pipefitter members.

Thus, it is undisputed that Mr. Valentine and HDCC knew that HDCC could not directly hire any of the employees. In fact, the most that the discriminatees could do would be to *attempt* to complete the application process at Local 675 and then sit on the out of work list until called.[9]

This problem is clearly illustrated by the case of Declarant Gordon Caughman. Caughman got on the Pipefitters out of work list on February 24 but was not dispatched to HDCC until March 28, 2011, more than a month later. (*See* Declaration of Gordon Caughman ¶ 3, attached to G.C. Ex. 1(k).)[10]

Paul Aona was told that he could "sign up because the 'bench was empty' and HDCC would be hiring." This just confirms that HDCC was bound to use the referral procedure; it could not reinstate any of the discriminatees directly. (*See* Aona Affidavit ¶ 4.)

In summary, then, there is one fundamental problem: HDCC had been refused its request to hire employees who had formerly worked for it directly. The best that could happen would be that the discriminatees would be on the Pipefitters Out-of -Work list *if eligible* for it. Thus, HDCC knew that it could not offer employment directly to anybody and therefore this request was a sham. *See Raymond Interior Sys. v. NLRB,* 812 F.3d 168, 179-80, (D.C. Cir. 2016).

The referral procedure of Pipefitters Local 675 is unlawful under these circumstances. In analyzing this, we have to remember that HDCC is not a member of any multi-employer association but is a single employer.

It is unlawful to apply the referral procedure under these circumstances because being on a referral list requires current dues and maintenance fees. Thus, it would require any of the discriminatees to be current in their dues or fees in order to register as a Class A, B or C. The CBA procedure also requires that applicants for employment agree to "comply with the terms

[9] And they would be on the bottom of the dispatch list.

[10] It appears that two former Boilermakers were also members of the Pipefitters. That explains why they were able to register and be dispatched, because they were already members. Those two are Mr. Caughman and Hank Merrill. (*See* affidavit of Paul Aona ¶ 4.)

and conditions of this agreement ...." (*See* Pipefitters Local 675 Agreement, Section 6, p. 27.) Finally, none of them could qualify as Class A or Class B because they had not worked within the jurisdiction. The hiring procedures could not lawfully be applied to the discriminatees.

Although one of the discriminatees was an apprentice, he was not indentured to a Pipefitter Program and thus could not register under Class D either. Mr. Esmeralda and any other apprentice were therefore effectively blocked from registering because they were not indentured to a pipefitter program. They could not be classified as a journeyperson to be registered as Class A, B, or C. Thus, as to Mr. Esmeralda the referral procedure was unavailable.

Class A, B, and C, as noted above, require that dues and maintenance fees be current. To the extent that employees may be referred into the multi-employer unit, it may be permissible to insist on currency of dues. That is, however, not permissible with respect to a single employer. The reason is, of course, that employees are entitled to their eight days of employment before they must satisfy the union security obligation. The Board has ruled that employees are entitled to separate grace periods for individual non-multi-employer units even though employers may be signatory to identical labor agreements. *See Carpenters Local 740*, 238 N.L.R.B. 159 (1978), and *Iron Workers Local 433*, 266 N.L.R.B. 154 (1983). Thus, the requirement that HDCC discriminatees be current in membership dues is unlawful because they were entitled to at least the eight-day grace period.

An employer violates Section 8(a)(3) when it conditions its employees' continued employment on immediate membership in the union at a time when the employees enjoy a contractual or statutory grace period, during which they cannot be lawfully compelled to join the union. *See Acme Tile & Terrazo Co.*, 318 N.L.R.B. 425, 427-28 (1995), *enforced*, 87 F.3d 558 (1st Cir. 1996); *accord*, *Booth Servs., Inc.*, 206 N.L.R.B. 862, 865 & n.8 (1973), *enforced as modified*, 516 F.2d 949 (5th Cir. 1975); *NLRB v. Campbell Soup Co.*, 378 F.2d 259 (9th Cir. 1967); *see generally Penn. State Educ. Ass'n v. NLRB*, 79 F.3d 139, 154 (D.C. Cir. 1996) (employer violates Section 8(a)(3) when employer and union without a legitimate majority enter into collective-bargaining agreement that contains a provision requiring employees to become

union members).

The hiring procedure is also unlawful because it requires that applicants for employment agree to "comply with the terms and conditions of the agreement ...." (*See* Pipefitters Local 675 Agreement, Section 6, p. 27.) This requires employees who are applicants to agree to waive the eight-day grace period contained in the hiring procedures. It is also not a lawful requirement to require employees to agree to comply with any agreement as a condition of being dispatched.

The hiring procedure is also unlawful as applied to the HDCC discriminatees because none of them could qualify as Class A because none of them had 10,000 working hours with a signatory employer as a pipefitter, in this case, HDCC. That requirement may be met with a multi-employer group but not for the work that these discriminatees had done for HDCC. None of them could qualify as Class B because they had not "worked within the jurisdiction of the United Association…." Although some could qualify in Class C, this would put them substantially at the bottom of the out-of-work list, and thus they would not have been dispatched for a long time. In any case, Class C still required "maintenance fees current," and this would be unlawful as to the HDCC discriminatees.

The fact, moreover, that the Business Manager made plain that the employees had to complete "the Local 675 membership application process" to the Union imposed an unlawful condition because the Union cannot condition dispatching upon filling out a full application. They can only condition dispatching on paying the requisite fees and dues after expiration of the eight day grace period, or, in those cases where a multi-employer association may be involved, maintain their dues and fees current for dispatch and for that multi-employer association. *See Union Starch & Refining Co.*, 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir. 1951), *cert denied*, 342 U.S. 815 (1951). Completing a membership process goes beyond the financial core responsibilities of a lawful union security clause.

The Board law is clear that where an employer is well aware that the application of the union security clause is unlawful to the employee, the employer also violates Section 8(a)(3).

HDCC was well aware of the illegal provisions in the dispatching procedure when it

began its discussions with the Pipefitters and its request for variation from the procedure was denied. HDCC was fully aware, moreover, that employees would not be hired by it because they would be placed on the Pipefitters referral list at best.

Because at the same time HDCC knew that the union security clause would be applied illegally, HDCC violated Section 8(a)(3) by agreeing to its implementation. An employer has an obligation to investigate the circumstances surrounding any request for discharge and, in this case, a refusal to refer. Here, HDCC was well aware that the Pipefitters were applying the union security clause and the referral procedures unlawfully.

The employer was also well aware that employees were not provided their *General Motors*/*Beck* notice. An employer who takes action against an employee, knowing that there was a potential problem with the application of the union security clause, is also liable. *See Hosp. Del Maestro, Inc.*, 323 N.L.R.B. 93 (1997).

As a result of HDCC entering into an agreement with the Pipefitters, which imposed these hiring hall rules, the former employees were effectively deprived of their seniority and union status. They were forced to be placed on a referral system that put them substantially at a disadvantage to the current Pipefitter members. Because they would never catch up with the Pipefitter members, they would forever be at a lower position for referral to HDCC as well as any other contractors signatory to the Pipefitters. This is a permanent disadvantage.

In conclusion, then, union discrimination was at the heart of HDCC's action. As a construction employer, it knew that it had to terminate the Boilermaker Union members because any union with which it signed would require that its members be preferred. It is possible that HDCC hoped that perhaps another union, in this case the Pipefitters, would allow referrals of its former employees, but here that was adamantly refused prior to HDCC becoming a signatory. Moreover, the record is clear that the Pipefitters and HDCC required Union membership as a condition of referral, which is unlawful. *Cf. Garner/Morrison, LLC*, 353 N.L.R.B. 719 (2009), *vacated and remanded sub nom. NLRB v. Sw. Reg'l Council of Carpenters*, 826 F.3d 460 (D.C. Cir. 2016) (no cessation of work and no termination of employees when employer withdrew

recognition from one union and recognized a second union); and *Raymond Interior Sys. v. NLRB*, 812 F.3d 168 (recognition of rival union where no layoffs or cessation of work and workers voluntarily joined new union without loss of jobs).

Finally, the record has other evidence that supports a finding of Union discrimination. It is true that HDCC's welding operation was shut down only for a brief few days. It was shut down from February 17 until approximately March 1, 2011. On March 1, however, HDCC began hiring members of the Pipefitters Union. It continued to staff its project with those members. It wasn't until March 23 that the first former Boilermaker Union member completed the process and became a member of the Pipefitters and began work. This confirms that the Boilermakers had to become members of the Pipefitters and complete that process before they were hired.

V. THERE IS NO LEGITIMATE BUSINESS REASON TO SHUT THE WORK DOWN AND TERMINATE THE EMPLOYEES EVEN FOR A TEMPORARY PERIOD

The D.C. Circuit stated:

> The Board's alternative analysis under *Great Dane* [*NLRB v. Great Dane Trailers*, 388 U.S. 26(1967)] also provides no basis for denying the company's petition. The Board found that the company's conduct "was inherently destructive of [Boilermakers members'] right to membership in the union of their choosing, unencumbered by the threat of adverse employment action." Dec. 5. The company's February 17 letter terminating its relationship with the Boilermakers does include a sentence referencing Boilermakers membership but that supports the Board's view only if it is extracted from what else was stated in the letter and record evidence, including the company's twenty-year practice with Section 8(f) agreements. The Board did state "[e]ven assuming ... that the [company] discharged the alleged discriminatees because there was no collective-bargaining agreement in place," that it "would still find that this justification did not outweigh the harm done to the employees on account of their union affiliation." *Id.* at 6. But no exception was filed to the ALJ's finding that the discharges had only a comparatively slight adverse impact. *Id.* at 7 n.14. Neither did the Board find that the company's business model was designed to, nor in fact operated to, single out particular unions for discriminatory treatment without regard to the absence of a current collective bargaining agreement. Other than referencing the two gaps and the parties' disagreement during their negotiations, the Board appears to have offered no reason for rejecting evidence that the company's conduct was only plausibly "inherently destructive" if the welders were separated

> *because* of their union membership, rather than — as the ALJ found — because of the expiration of their contract.

Hawaiian Dredging Constr. Co. v. NLRB, 857 F.3d at 885.

The D.C. Circuit questioned whether HDCC had sufficiently articulated a business justification to shut down. Its only articulated reason was that it wanted to operate under the terms of an agreement with at least some Union.

This makes no business sense. First, even if it terminated the bargaining relationship with the Boilermakers on February 17, it was free to continue to work those employees pending signing an agreement with a new Union. There is no evidence that any one of them would have refused to work, and thus HDCC's operation would have continued while HDCC sought out an agreement with another Union, and in this case the Pipefitters. HDCC has never asserted that these employees would have refused to continue working. Second, HDCC did not use the terminations as a method to obtain a collective bargaining agreement with the Boilermakers, which favored HDCC. This would have been the form of a lawful lockout. Rather, HDCC chose to terminate the employees, rather than lock them out. This makes a difference because termination is different than a lockout. A lockout does not terminate the employee's status. Indeed, HDCC stated on February 17 it would not hire Boilermakers on any future work. This is far more destructive than simply locking the employees out pending reaching a new agreement with the Boilermakers.

Third, although the company claimed that it wanted to work under the terms of an agreement, it never offered any business reason why it made sense to stop the work that was in progress while it worked out the terms of an agreement. That is counterintuitive to any business justification. Finally, HDCC never asserted any business reason why it needed to halt its welding operations and terminate these employees to facilitate in any way any business purpose. It has not explained why it reflected any business purpose. Indeed, shutting down and firing long-term employees carries no legitimate business purpose.

The appropriate analysis is that found in *CIMCO*, 301 N.L.R.B. 342 (1991), *enforced*, 964 F.2d 513 (5th Cir. 1992). Under *CIMCO*, even when an employer lawfully terminates a

Section 8(f) agreement, an employer is not justified in terminating those employees hired under the agreement simply because of their union affiliation or lack of affiliation. To do so would "inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employees' rights." *CIMCO*, 301 N.L.R.B. at 347 (citing *Swift Indep. Corp*., 289 N.L.R.B. No. 51, slip op. at 18 (June 29, 1988)). In other words, the termination of employees simply because they have been dispatched by a particular union or represented by a particular union is inherently destructive of an employee's rights under Sections 8(a)(1) and (3) of the Act as established in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967). As the act of discharging the employees for being represented by a particular union is inherently destructive of Section 7 rights, no further analysis is necessary for the Board to find and sustain an unfair labor practice. *Id.* at 34.

Jack Welsh Co., 284 N.L.R.B. 378 (1987) is undistinguishable. Under the holding of *Jack Welsh*, an employer can lawfully terminate an 8(f) relationship after the expiration; however, the employees have to be offered an opportunity to continue to work under the changed conditions (i.e., non-union shop) in order for the employer to perfect the separations without discharging the employees for a discriminatory reason. If *Jack Welsh* were applied, the Employer here would be required to produce evidence that each employee was provided an opportunity to work under the changed conditions of no union contract on February 17, 2011. No such evidence was produced or even suggested by HDCC. On February 17, 2011, when each of these employees was terminated, they were told the reason for termination was that the work they were performing was no longer covered by a union contract. While the end of the Section 8(f) relationship would be a valid reason for the Employer not to request additional employees from the Boilermakers Union, it does not permit the termination of those employees who were then working for HDDC. They had already been dispatched by the Boilermakers, they were members of the Union, and they had worked under the terms of the Boilermaker Union agreement. The employer had no legitimate business reason to terminate or suspend them.

In summary, then, the Board should reject HDCC's proffered business justification both

because it was based on Union discrimination and because HDCC has not explained why it chose to both terminate its long term, valued employees and to shut the work down on a temporary basis when it could have continued to work them until it resolved the terms of a new agreement. Indeed, this is inconsistent with HDCC's prior conduct, in which it continued to work the Boilermaker members while it sought an agreement even in the face of both threatened strikes as well as strikes by the members of the Boilermakers Union pending reaching an agreement.

VI. THE TERMINATION OF THE EMPLOYEES BECAUSE OF UNLAWFUL RESRICTIONS REQUIRING FULL MEMBERSHIP IS A PER SE VIOLATION OF SECTION 8(A)(3)

Section 8(a)(3), 29 U.S.C. § 158(a)(3), was amended in 1947 to deal expressly with this issue. Although union security arrangements are permissible, it is unlawful to condition "membership" upon giving up one's membership in another union. Second, it is unlawful to condition referral, and thus employment, upon anything other than meeting the financial obligation normally required of other employees, whether employment is under a construction industry agreement governed by Section 8(f) or Section 9(a) agreement governed by 29 U.S.C. § 159(a). Thus, for example, it is unlawful to require that employees fill out an application process for membership. *See Union Starch & Refining Co.*, 87 N.L.R.B. 779, and *Local Union No. 749, Int'l Bhd. of Boilermakers v. NLRB*, 466 F.2d 343 (D.C. Cir. 1972).

It is apparent that HDCC's plan, after firing the Boilermakers and withdrawing recognition from the Boilermakers, was to force the Boilermakers who were members of the Boilermakers Union to go to work under the Pipefitters' agreement. However, Mr. Valentine accurately expressed HDCC's intent that it would no longer be using members of the Boilermakers Union because its employees would now have to become members of the Pipefitters Union. The unlawful motivation is plainly established. The unlawful motivation is furthermore confirmed because HDCC knew that unlawful conditions of membership, and thus discrimination within the meaning of Section 8(a)(3), were being imposed by the Pipefitters as a condition of allowing the Boilermakers to continue working for HDCC. HDCC agreed to those

unlawful conditions. Additionally the Pipefitters made it clear that under its referral rules, its members would go to work first.

Thus, the termination of the employees was unlawful because it was a *per se* violation of Section 8(a)(3) and (1). The unlawful motivation is plainly established given the statements of HDCC and its conduct, and there is no need to do a *NLRB v. Great Dane Trailers* analysis.

VII. CONCLUSION

The Board should re-affirm its prior decision. There is more than enough in the record to establish that the "gap" periods undercut completely HDCC's asserted defense of working only when there was a collective bargaining agreement in existence.. There is also compelling evidence in the record that HDCC's decision to terminate the employees who were members of the Boilermakers Union and advise them that there would be no future work for them was unlawfully motivated by Union considerations. Those considerations were that the Pipefitters would not allow them to go back to work and the Pipefitters insisted on referring their members first.

Dated: October 24, 2017

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
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/s/ David A. Rosenfeld

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On October 24, 2017, I served the following documents in the manner described below:

STATEMENT OF POSITION OF THE CHARGING PARTY ON REMAND

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 24, 2017, at Alameda, California.

/s/ *Karen Kempler*
Karen Kempler